

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

CRAIG MENDENHALL §
v. § CIVIL ACTION NO. 5:07cv44
JOSEPH WILSON, ET AL. §

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
ON PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

The Plaintiff Craig Mendenhall filed this lawsuit alleging deprivations of his constitutional rights by prison officials. The lawsuit has been referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

On June 7, 2007, the Plaintiff filed a motion seeking a default judgment against the Defendants for their failure to answer the lawsuit as ordered. Mendenhall followed this with a motion for a trial setting in light of the Defendants' default. While these motions were under review by the Court, the Defendants filed their answer in the case, on June 25, 2007.

A default judgment is severe, and should only be entered in extreme circumstances. United States v. DiMucci, 879 F.2d 1488 (7th Cir. 1989). Since it is preferential to determine an action on the merits, the court resolves any doubt as to whether default should be entered in favor of hearing the case on the merits. Pena v. Seguros La Comercial, S.A., 770 F.2d 811 (9th Cir. 1985). The granting or denying of a default judgment is committed to the sound discretion of the district court. Mason v. Lister, 562 F.2d 343 (5th Cir. 1977).

In this case, the Defendants have answered the lawsuit and so Mendenhall's claims against them should be resolved on the merits rather than through the vehicle of a default judgment. The Court notes that the answer was due on May 23 and that when filed, the answer did not offer an

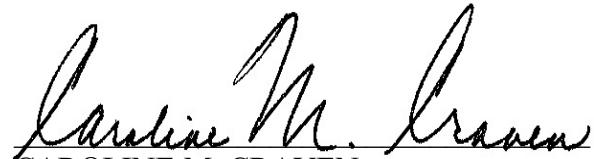
explanation for the tardiness, nor was a motion for extension of time or motion for leave to file an answer out of time presented. Nonetheless, the issues are now joined and the preferred course is to decide the case on the merits; consequently, Mendenhall's motion for default judgment should be denied.

RECOMMENDATION

It is accordingly recommended that the Plaintiff's motion for a default judgment (docket no. 10) and motion for trial setting in light of the default (docket no. 12) be denied.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within ten days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 6th day of July, 2007.



CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE